Supreme Court, U.S.
FILED

95-238 AUG 7 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MAHESH BHARDWAJ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

I. Does a defendant "frivolously contest" relevant conduct simply because the trial court elects to credit the prosecution's witnesses?

II. Does a defendant who objects to a non-material allegation in a pre-sentence report "frivolously contest relevant conduct?"

III. Is it proper to double-count the same conduct to support an enhancement of the Guidelines for both obstruction of justice and more than minimal planning?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF CASES AND AUTHORITIES..... iv

CITATION TO OPINIONS BELOW..... 2

JURISDICTION..... 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED..... 4

STATEMENT OF THE CASE..... 6

A. The Course of Prior Proceedings 6

B. Statement of Facts..... 9

1. The Fraudulent Scheme..... 9

2. Plea and Sentence 14

THE REASONS THIS COURT SHOULD GRANT THE WRIT..... 28

I. THE LOWER COURT APPLIED A DEFINITION OF 'FRIVOLOUS' THAT CONFLICTS WITH THIS COURT'S DECISION IN NIETZKE V. WILLIAMS, 490 U.S. 319 (1989)..... 28

II. THE DISTRICT COURT RELIED UPON IRRELEVANT CONDUCT TO ENHANCE THE GUIDELINES..... 36

III. IT IS IMPROPER TO DOUBLE-COUNT THE SAME CONDUCT TO SUPPORT ENHANCEMENTS FOR BOTH "MORE THAN MINIMAL PLANNING" AND FOR "OBSTRUCTION OF JUSTICE."..... 40

CONCLUSION..... 44

TABLE OF CASES AND AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 (1967)..... 32

Ebbole v. United States, 8 F.3d 530 (7th Cir. 1993), cert. denied, 114 S.Ct. 1229 (1994)..... 28

Nietzke v. Williams, 490 U.S. 319 (1989)..... 28, 31

United States v. Beauchamp, 986 F.2d 1 (1st Cir. 1993)..... 42

United States v. Cedano-Rojas, 999 F.2d 1175 (7th Cir. 1993)..... 34

United States v. Fields, 39 F.3d 439 (3rd Cir. 1994)..... 31

United States v. Frierson, 945 F.2d 650 (3rd Cir. 1991), cert. denied, 112 S.Ct. 1515 (1992)..... 29, 38

United States v. Oliveras, 905 F.2d 623 (2nd Cir. 1990)..... 29

United States v. Smith,
13 F.3d 860 (5th Cir. 1994),
cert. denied, 114 S.Ct. 2152
(1994)..... 33

United States v. Wong, 3 F.3d 667
(3rd Cir. 1993)..... 41, 42

Witte v. United States,
___ U.S. ___, 115 S.Ct. 2199
(1995)..... 34

Statutes

18 U.S.C. Sec. 3231..... 4

18 U.S.C. Sec. 3742..... 4

28 U.S.C. Sec. 1254(1)..... 3

28 U.S.C. Sec. 1291..... 3

28 U.S.C. Sec. 1915 (d)..... 31, 33

U.S.S.G. Sec. 1B1.3(a)(1)(A)..... 37

U.S.S.G. Sec. 3C1.1..... 43

U.S.S.G. Sec. 3E1.1..... 28, 31

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAHESH BHARDWAJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner, Mahesh C. Bhardwaj, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Third Judicial Circuit to review its

judgment order May 10, 1995, affirming a judgment of conviction duly entered by the United States District Court for the Middle District of Pennsylvania on September 14, 1995, sentencing petitioner to a term of sixteen months in prison, plus restitution, fine, and a period of supervised release.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed by judgment order. A copy of that Order is reproduced as Appendix A, commencing at 1a.

The opinion of the United States District Court for Middle District of Pennsylvania is unpublished. A copy of the opinion and order is annexed hereto

as Appendix B, commencing at 3a.

JURISDICTION

The judgment of the United States Court of Appeals of the Third Circuit was entered on May 10, 1995.

This Court has jurisdiction to review, through certiorari, the decision of the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. Sec. 1254(1).

The United States Court of Appeals for the Third Circuit had jurisdiction to hear the appeal from the final judgment of conviction, pursuant to 28 U.S.C. Sec. 1291.

The final judgment of conviction was entered on September 19, 1994. A Notice of Appeal was timely filed on September 26, 1994.

This is a criminal matter commenced by the filing of an indictment returned by a grand jury sitting in the Middle District of Pennsylvania. Said indictment alleged violations of various provisions of Title 18 of the United States Code. The district court had jurisdiction pursuant to 18 U.S.C. Sec. 3231 and 18 U.S.C. Sec. 3742.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S.S.G. Sec. 3E1.1 provides, in pertinent part:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

U.S.S.G. Sec. 1B1.3(a)(1)(A) provides, in pertinent part:

> Relevant Conduct (Factors that Determine Guideline Range)

all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . .

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense . . . . .

U.S.S.G. Sec. 3C1.1 provides, in

pertinent part:

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

A. The Course of Prior Proceedings

Mahesh C. Bhardwaj, his wife, Mini S. Bhardwaj, and his company, Ultran Laboratories, Inc., were indicted on July 22, 1993, along with a co-defendant, Charles J. Morris, on one count of conspiracy to commit mail and wire fraud, 18 U.S.C. Sec. 371, and five substantive fraud counts. The indictment was superseded, alleging obstruction of justice, money laundering, and criminal forfeiture.

Charles Morris entered a guilty plea and cooperated with the government.

Trial commenced against the remaining defendants on April 11, 1994. On the first day of trial, Mahesh Bhardwaj pleaded guilty to one violation

of 18 U.S.C. Sec. 371. Ms. Bhardwaj was placed in pre-trial diversion, and the charges against Ultran were dismissed.

On May 18, 1994, the Probation Department furnished a copy of the Presentence Report (PSR) to the parties. The PSR designated the applicable offense level as 13 and the criminal history category as I.

The defense filed its objections on May 31, 1994, arguing that Mr. Bhardwaj's acceptance of responsibility entitled him to a two-level reduction. The defense also objected to the assessment of a two-level increase for obstruction of justice and a two-level increase for more than minimal planning.

On June 14, 1994, the Probation Department issued an amended PSR.

However, the Guideline calculations remained the same.

On August 15, 1994, a sentencing hearing was held. On August 25, 1994, the Hon. Malcolm Muir, Senior Judge, rejected the defense arguments and upheld the offense level of 13.

Sentencing took place on September 14, 1994. The district court imposed a sentence of 16 months imprisonment, $9,320.15 in restitution, a fine of $5,000.00, and two years of supervised release.

The judgment and commitment order was entered on September 19, 1994. The defendant filed a Notice of Appeal on September 26, 1994.

On May 10, 1995, the United States Court of Appeals for the Third Circuit

affirmed the district court, by judgment order, without opinion.

This petition followed.

B. Statement of Facts

1. The Fraudulent Scheme

Charles J. Morris was a senior engineer and manager with Timken Company, a Canton, Ohio company that manufactures various steel-alloy products. Timken, as part of its steel-testing program, regularly used an instrument known as an ultrasonic "transducer," designed to send sound waves into metal.

These highly specialized, precision instruments are manufactured by Ultran Laboratories, Inc., located in State College, Pennsylvania. Ultran was the brainchild of Mahesh C. Bhardwaj, a

distinguished engineer, and his wife, Mini S. Bhardwaj. Prior to his arrest, Mahesh Bhardwaj served as the Chief Executive Officer for Ultran. Due to his expertise and abilities in this specialized area, Ultran grew and profited. At the time of the events herein, Ultran employed about a dozen people, and had supplied transducers used for assessment of defects in nuclear reactors as well as in the NASA space program.

Ultran made transducers to the specifications of individual clients, based upon particular needs. However, whenever an order was filled, it was Ultran's practice to make two or three additional transducers to the same specifications, in case one malfunctioned or was damaged. If the

transducer was not needed, it would go into stock. As a result, Ultran maintained its own stock of transducers of various specifications.

The Timken company regularly ordered transducers from Ultran. During the course of the professional relationship between Timken and Ultran, the former placed at least ten orders for thirty-three transducers with the latter.

In June, 1988, Mr. Morris desperately needed money. He contacted Mr. Bhardwaj and suggested a simple scheme. Morris would create a phony purchase order requesting four unnecessary transducers from Ultran. Morris would then authorize the payment of $12,160 to Ultran for the transducers. Once Ultran received the

funds, Ultran would send Mr. Morris $10,000.00 and keep the balance of $2,160. To justify Ultran's disbursement of funds, Mr. Morris would send two invoices for fictitious consulting work. Mr. Bhardwaj, who had no prior criminal record of any type, acquiesced to prevent losing Timken as a customer. The scheme was executed as planned.

In May, 1991, the Postal Service served a subpoena on Ultran, seeking documentation relevant to the transducer order and delivery.

In response to this grand jury subpoena, Ms. Bhardwaj contacted Morris and requested that he provide documentation of the consulting work that he had done for Ultran. Mr. Morris then created two false

engineering reports and gave them to Ms. Bhardwaj. Mr. Bhardwaj then "reviewed" these reports, and made notations on them.

Meantime, Timken had started its own audit. John R. Nichols, a corporate audit specialist with Timken, reviewed ten purchase orders for thirty-three transducers that Timken had ordered from Ultran. Of these, four transducers -- the ones ordered by Mr. Morris -- could not be located. Moreover, Timken did not have any documentation showing that the transducers had actually been delivered. Nichols then sent a debit memorandum to Ultran for $12,160.00.

Mr. Bhardwaj responded, by letter dated March 21, 1991, in which he stated that one Arun Madhav, an Ultran employee, had delivered the transducers

when he visited the Timken facility in October, 1988.

In May, 1991, Ms. Bhardwaj submitted the consulting reports to the grand jury. In September, 1992, the attorney for the Bhardwajs and Ultran submitted additional documentation that purported to reflect the delivery of the transducers.

2. Plea and Sentence

In February, 1994, a proposed plea agreement with Mr. Bhardwaj fell apart when he refused to state that the transducers had, in fact, never been delivered. Months later, on April 11, 1994, Mr. Bhardwaj pleaded guilty to violating 18 U.S.C. Sec. 371 and gave a full allocution as to the fraud. However, the prosecutor carefully

avoided the issue of whether or not the transducers had actually been delivered.

The plea was accepted by the Court.

On May 18, 1994, the Probation Department furnished a Pre-Sentence Report to the parties.

The PSR calculated the base level of the offense at 6, and added 3 points for the loss of $12,160.00. Two more levels were added for more than minimal planning, and an additional two levels added for obstruction of justice. The Probation Department noted that due to the increase for obstruction of justice, Mr. Bhardwaj was not eligible to receive the two-level reduction for acceptance of responsibility. The total offense level was calculated at 13, the criminal

history category at I, and the guideline range was 12 to 18 months.

In its narrative summary, the PSR noted, in passing, that the transducers in question had never been sent to Timken. The Probation Department ascribed no significance to this fact. The amount of Timken's loss attributable to Mr. Bhardwaj -- $12,160.00 -- was the same regardless of the delivery of the transducers. The delivery or lack thereof was not used as the basis to grant or deny any change in the offense level calculation.

In addition, the government's theory of the prosecution did not depend on the delivery, vel non, of the transducers. In its May 5, 1994 sentencing memorandum, the government stated that it "maintains that whether

or not the transducers were in fact delivered to Timken does not have a bearing on whether or not Mahesh Bhardwaj is guilty of mail fraud." Mr. Bhardwaj did not allocute to this issue and was not required to do so. The gravamen of the offense was that Timken ordered and paid for unnecessary transducers in order to enrich Mr. Morris and Ultran.

Soon, however, the question of whether the transducers were actually delivered would take on a life of its own. The question would dominate the proceedings and become the single most contested issue in the entire case.

On May 27, 1994, the defense filed its objections, arguing that the appropriate offense level was 7. The defense asserted that Mr. Bhardwaj

should receive a two-point deduction for acceptance of responsibility. The defense objected to the enhancements for obstruction and for more than minimal planning, noting that the acts of obstruction were performed by others and that the scheme itself, by the standards of frauds, was fairly ordinary. The defense also noted, again in passing, that the transducers had been delivered.

The probation department adhered to its original calculations, and noted the factual dispute as to the actual delivery.

On August 15, 1994, a full hearing was devoted to ascertaining whether the transducers had, in fact, been delivered, although the relevance of this issue was opaque.

Nonetheless, a hearing went forward on the issue. The defense called Gary F. Stead, the Vice-President of Ultran Laboratories. Stead conducted a complete inventory of all transducers of the type and variety described in the purchase order. He determined that Ultran had manufactured the four transducers in question. These transducers were no longer in stock, and were not otherwise accounted for, except in the Timken purchase order. Stead went on to testify that hand-delivery of transducers was common, and, during the time in question, Ultran frequently did not obtain receipts for such deliveries. Based upon his review of the records, he concluded that the transducers had, in fact, been manufactured and delivered.

Susan Cramer, the former shipping

clerk at Ultran, identified the notation "hand delivered" on the Timken purchase order as her own writing, and that it signified that the transducers in question had been hand delivered. She recalled assembling the order and packing the transducers. However, under closer questioning, she acknowledged that her testimony was based upon a reconstruction of her usual practice, rather than upon a specific recollection of what she did with respect to that particular order. She also stated that she would have given the package to either Arun Madhav or Chuck Valenza for delivery.

The defense read into the record the grand jury testimony of Arun Madhav. Mr. Madhav told the grand jury that he had visited Timken on October 21, 1988,

in order to meet with the entire group of engineers there. He had been given a package to deliver from Ultran, but he did not know what it contained. He never got a receipt, but left the package on a desk and told Ms. Cramer that it had been delivered.

The prosecution then responded by calling Anil Goswami, a former Ultran employee. He testified that when Mr. Bhardwaj told him of the scheme, he specifically stated that the transducers would not be delivered. Mr. Goswami, however, acknowledged that the four transducers in question had been manufactured by Ultran, and that he could not say whether in fact they had been delivered.

Mr. Goswami also testified that he heard Mr. Bhardwaj tell Ms. Cramer not

to pack the transducers, because Mr. Bhardwaj himself would deliver them to Timken. However, Goswami admitted that this conversation took place in early December, 1988, just before Mr. Bhardwaj actually did take a trip to Timken and actually did bring some transducers with him.

The prosecution also called Timken auditor John Nichols. He testified that he could not locate the four transducers in question, and that Timken had no proof that they had ever been delivered. However, Morris could have received the transducers without Nichols knowing about it.

The prosecution then called the Timken engineers who had been present at the October 21, 1988 meeting attended by Mr. Madhav. They all testified on

direct examination that they had not been given any transducers, and no one could recall a Mr. Madhav carrying a box. On cross-examination, they acknowledged that Mr. Morris could have received the transducers without their knowledge.

Mr. Morris also testified. He claimed that after the grand jury subpoena had been issued, he drafted a letter explaining that two of the transducers had been delivered by Mr. Madhav, and the other two by Mr. Bhardwaj. Morris testified that he showed the document to Mr. Bhardwaj, who noted that it conflicted with Mr. Bhardwaj's own letter on March 21, 1990, to Timken. Mr. Morris denied ever having received the transducers, and testified that the entire story about

Mr. Madhav had been concocted, after the fact, as a cover story.

On the issue of more than minimal planning, Michael C. Hartman, a postal inspector with 15 years experience and an accountant, was called by the prosecution. Hartman testified that the fraudulent scheme itself was fairly simple -- there was nothing unusual or complex about obtaining the $10,000.00 and creating a false invoice. On the other hand, what made the case complex and unusual was the repeated supplying of new documentation and new explanations about the manufacture and delivery of the transducers, in response to investigative inquiries.

The prosecution's closing arguments tracked the analysis used by the Probation Department, viz., that the

creation of false documents constituted more than minimal planning; that the creation, annotation, and submission of the false consulting reports to the grand jury was an obstruction of justice; and that the "acceptance of responsibility" decrease is not available when one obstructs justice. Again, the delivery of the transducers was an issue that seemed to have no relationship to any of these issues.

The sentencing court made detailed findings of fact, almost none of which were in dispute. As to the transducer issue, though, the Court found that "at least three of the four ultrasonic transducers for which Timken was billed never existed" and that none the transducers had been delivered. The Court finally ascribed some significance

to this fact. In denying the two-level reduction for acceptance of responsibility, the court held:

> Mahesh Bhardwaj's assertion that the Ultran transducers were delivered to Timken constitutes a frivolous contest of relevant conduct, thereby disqualifying him for a decrease in his offense level. . . .

The court eschewed all reliance on the rationale used by the Probation Department and echoed by the government; it was not the obstruction of justice that cost Mr. Bhardwaj the two-level reduction. Had Mr. Bhardwaj not disputed the otherwise meaningless issue of the transducer delivery, he would have received the two-level decrease.

The court also held that the requirement of "more than minimal planning" had been satisfied by both the facts of scheme itself, as well as by

the creation of the fictitious consulting reports for the grand jury.

Lastly, the court found that the delivery of the phony reports to the grand jury warranted the two-level increase for obstruction of justice.

Accordingly, the trial court imposed a sentence of sixteen months.

The Third Circuit affirmed by judgement order.

REASONS TO GRANT THE WRIT

I. THE LOWER COURT APPLIED A DEFINITION OF 'FRIVOLOUS' THAT CONFLICTS WITH THIS COURT'S DECISION IN NIETZKE V. WILLIAMS, 490 U.S. 319 (1989).

Under U.S.S.G. Sec. 3E1.1, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level reduction in the offense level. Prior to November 1, 1992, a defendant received the two-level reduction, upon a guilty plea, only if he accepted responsibility for all his criminal "conduct." Such conduct included the acts underlying the actual offense of conviction, as well as uncharged conduct related to that offense. See, e.g., Ebbole v. United States, 8 F.3d 530, 537 (7th Cir. 1993), cert. denied, 114 S.Ct.

1229 (1994). Defendants were required to admit, upon pain of losing their reduction, a wide variety of criminal conduct going well beyond the actual offense. This created a substantial burden upon a defendant's remaining Fifth Amendment privileges. See, e.g., United States v. Frierson, 945 F.2d 650, 659-660 (3rd Cir. 1991), cert. denied, 112 S.Ct. 1515 (1992)("An increase in sentence or a denied reduction in sentence is a penalty in the context of Fifth Amendment jurisprudence."); United States v. Oliveras, 905 F.2d 623, 628-30 (2nd Cir. 1990)(Violation of Fifth Amendment to condition reduction upon admission of conduct outside the crime of conviction).

This problem was eliminated by an amendment to the Guidelines that deleted

the term criminal "conduct" and substituted the narrower term of "offense." The Commentary was also amended. Instead of requiring "voluntary and truthful admission to authorities of involvement in the offense and related conduct," the amendment substituted the requirement that the defendant:

> truthfully admit the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under Sec. 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in

a manner inconsistent with acceptance of responsibility.

U.S.S.G. Sec. 3E1.1, comment. (n.1(a))(Nov. 1, 1992); United States v. Fields, 39 F.3d 439 (3rd Cir. 1994).

The Sentencing Guidelines do not define when a contest is "frivolous." No such definition is found in the Application Notes or other Commentary. There is not a single reported case, where a reduction was denied on the ground of "frivolous contest." There is no case, in this or any other court, that defines "frivolously contests."

This Court, however, has clearly defined the term "frivolous" in other contexts. In Nietzke v. Williams, 490 U.S. 319 (1989), this Court defined "frivolous," as that term is used in 28 U.S.C. Sec. 1915(d). The Nietzke Court started by looking to the definition of

"frivolous" that it had crafted in Anders v. California, 386 U.S. 738 (1967), when it delineated a lawyer's duty with respect to meritless appeals. In Anders, the Court held that an appeal on a matter of law was frivolous where "[none] of the legal points [are] arguable on their merits." Id. at 744. "By logical extension," held the Nietzke Court, "a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks and arguable basis either in law or fact." 490 U.S. at 324.

The Nietzke Court was careful to devise a standard that was generous to litigants, holding that even a complaint which fails to state a claim for relief under Fed.R.Civ.Proc. 12(b)(6) was not

automatically a "frivolous" claim under Sec. 1915(d). Section 1915(d) was "designed to discourage the filing of, and waste of judicial and private resources upon baseless lawsuits" that would ordinarily be discouraged by both the filing fees and the threat of Rule 11 sanctions. Id. at 319. In order to effectuate this purpose, courts were given the "unusual power to pierce the veil of the complaint's factual allegations." But such power had to be used sparingly. Only factual claims that described "fantastic or delusional scenarios. . . . " would be deemed "frivolous." Id. at 327. The Nietzke Court was specifically reiterated "the understanding articulated in other areas of the law that not all unsuccessful claims are frivolous." Id. at 328.

Applying Nietzke to the facts of this case demonstrates that the district court employed an improper standard for determining when a defendant "frivolously contests" an issue. The question of whether or not the transducers were delivered was certainly arguable. Mr. Stead and Ms. Cramer both testified to undisputed facts which supported the inference that the transducers had been delivered to Timken in October, 1988. This was not the only inference that such facts supported; nor was it the inference drawn by the court. But it plainly was an "arguable" inference that was not irrational or delusional. Indeed, both Stead and Cramer testified that they believed that the transducers had, in fact, been delivered. Although none of the

engineers who were present at the October meeting were given a package or recalled one, they likewise could not rule out Madhav's account of leaving a box on a desk, or the possibility that Morris had received the transducers.

It was also plausible that the corrupt Mr. Morris, a small-time crook, was lying. It was hardly fanciful to suggest the possibility that Mr. Morris did obtain the transducers and disposed of them at a later time, as part of another scheme. It is not unknown for a cooperating defendant to deny some part of his own criminal conduct. The fact that the court chose to credit Morris' testimony after the hearing hardly meant that joining issue was "frivolous." The two sides had different views of the

facts, neither of which was fantastical, delusional, or fanciful.

The mere fact that the court chose to believe one set of witnesses, and not the other, does not make the contest over the issue "frivolous."

II. THE DISTRICT COURT RELIED UPON IRRELEVANT CONDUCT TO ENHANCE THE GUIDELINES.

It is baffling that both sides strove so hard to prove or to disprove a fact the existence or non-existence of which had long ceased to have any relationship to any material issue in the case. The non-delivery of the transducers had absolutely no effect on the Probation Department's calculation of the appropriate Guideline level. The PSR mentioned the purported non-delivery of the transducers only in passing. Mr.

Bhardwaj's failure to deliver the transducers did not raise the offense guideline; neither would his delivery of the transducers have reduced the offense guideline. This was a foolish battle over a non-issue. At most, the defendant contested irrelevant conduct.

Under U.S.S.G. Sec. 1B1.3 (a)(1)(A), "relevant conduct" must have some effect upon the overall guideline determination regarding the base offense, specific offense characteristics, or adjustments. Conduct that the defendant engaged in that does not have an impact on one of these three areas is irrelevant, notwithstanding the fact that the defendant engaged in it during the criminal scheme. In the extensive illustrations provided by the

Application Notes, relevant conduct is always that conduct which affects the guideline determination in some manner. U.S.S.G. Sec. 1B1.3 (Commentary, 2(a)(1)-(8)).

This use of relevant conduct "in determining specific offense characteristics complies with the Sentencing Commission's intent to inject certain 'real offense' elements into the Guidelines . . . . " Frierson, 945 F.2d at 653. And in every other reported case, when the defendant contests or denies an allegation, he does so in a situation where the allegation, if proven, will raise his offense level. See, e.g., Frierson, 945 F.2d at 653 (Whether the defendant had a gun at the time was relevant to determining the proper guideline sentence); United

States v. Smith, 13 F.3d 860 (5th Cir. 1994), cert. denied, 114 S.Ct. 2152 (1994)(Difference between quantity of cocaine for which defendant accepted responsibility and the quantity for which she was found responsible was six offense levels; her disputing the amount resulted in denial of two-level reduction.); United States v. Cedano-Rojas, 999 F.2d 1175 (7th Cir. 1993)(The defendant's false denial of responsibility for the other 49 kilos of cocaine properly resulted in denial of two-level reduction).

Just a few months ago, in Witte v. United States, ___ U.S. ___, 115 S.Ct. 2199 (1995), this Court held that "[t]he relevant conduct provision of the Sentencing Guidelines [enhances a sentence when a crime] was either

accompanied by or preceded by additional criminal activity." (emphasis added). The delivery or non-delivery of transducers was not "additional criminal activity." It was completely irrelevant and the district court should have so held.

III. IT IS IMPROPER TO DOUBLE-COUNT THE SAME CONDUCT TO SUPPORT ENHANCEMENTS FOR BOTH "MORE THAN MINIMAL PLANNING" AND FOR "OBSTRUCTION OF JUSTICE."

The trial court improperly relied upon the efforts by Mr. Morris and the Bhardwajs to mislead investigators as a basis for finding more than minimal planning. The trial court first found that this conduct constituted an obstruction of justice. Having made this determination, the court could not "double-count" the obstruction conduct

to support an increase for more than minimal planning.

The issue of double-counting of conduct was addressed in United States v. Wong, 3 F.3d 667, 669 (3rd Cir. 1993):

> Whether a judge may enhance under the two separate Guidelines . . . is a question of legislative intent. We follow the clear, unambiguous language of the Guidelines if there is no discernable manifestation of contrary intent. . . .

In holding that there was no impermissible double-counting in using the same conduct to support a finding of more than minimal planning and a finding that the defendant was an organizer of the activity, the Wong Court found it "significant that the Guidelines themselves do not contain an express prohibition on the application of both of these offense level enhancements."

Id. at 670. The Wong Court noted that there were such limitations in other parts of the Guidelines. Accordingly, the principle of expressio unius est exclusio alterius applied. Id. at 670.

In the case of concealment conduct that also constitutes an obstruction of justice, the Guidelines themselves specifically prohibit that conduct from being used to support an increase for more than minimal planning. Commentary 1(f) to U.S.S.G. Sec. 1B1.1 provides:

> "More than minimal planning" means more planning than is typical for commission of the offense in simple form. "More than minimal planning" also exists if significant affirmative steps were take to conceal the offense, other than the conduct to which Sec. 3C1.1 (Obstructing or Impeding Justice) applies.

(emphasis added). See also, United States v. Beauchamp, 986 F.2d 1, 5 (1st Cir. 1993)("significant affirmative

steps to conceal will not constitute more than minimal planning when Sec. 3C1.1 applies to the conduct . . . . the exclusion in Application Note 1(f) of conduct to which Sec. 3C1.1 applies is intended to avoid the double-counting that would result if courts treated the same post-offense concealment as both more than minimal planning and obstruction of justice.")

In this case, it is clear that the conduct in question -- creation of false reports to mislead the grand jury -- is precisely the type of conduct that is covered by Guideline 3C1.1. Under Application Note 3(c), the "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding" is an example of the type of

conduct to which the enhancement applies.

The "concealment" conduct used by the court to support its finding of more than minimal planning cannot be used for that purpose according to the text of the Guidelines themselves. Accordingly, the second rationale for the court's finding of more than minimal planning must fail as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court, direct that Mr. Bhardwaj receive a two-level reduction for acceptance of responsibility, and order that the two-level enhancement for more than minimal planning be removed. This

Court should then remand the matter back for sentencing.

Respectfully submitted

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